UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD P. BRANDL, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of Social Security Administration, Defendant.	Case No. CV 11-7719-SP MEMORANDUM OPINION AND ORDER

I.

INTRODUCTION

On September 16, 2011, plaintiff Richard P. Brandl filed a complaint against defendant Michael J. Astrue, seeking a review of a denial of a period of disability and disability insurance benefits ("DIB"). Both plaintiff and defendant have consented to proceed for all purposes before the assigned Magistrate Judge pursuant to 28 U.S.C. § 636(c). The court deems the matter suitable for adjudication without oral argument.

Plaintiff presents four disputed issues for decision: (1) whether the

Administrative Law Judge ("ALJ") properly rejected the opinion of Dr. Leigh Anne Selby; (2) whether the ALJ properly considered the Veterans Administration's ("VA") disability rating; (3) whether the ALJ properly determined plaintiff's residual functional capacity ("RFC"); and (4) whether the ALJ properly discounted plaintiff's credibility.[1] Memorandum in Support of Plaintiff's Complaint ("Pl. Mem.") at 4-12; Defendant's Answer ("Answer") at 2-10.

Having carefully studied, inter alia, the parties's moving papers, the Administrative Record ("AR"), and the decision of the ALJ, the court concludes that, as detailed herein, the ALJ: improperly rejected the opinion of plaintiff's treating physician without providing specific and legitimate reasons supported by substantial evidence for doing so; failed to properly consider the VA's disability determination; made an RFC determination that was inconsistent with her analysis; and improperly discounted plaintiff's credibility. Therefore, the court remands this matter to the Commissioner of the Social Security Administration ("Commissioner") in accordance with the principles and instructions enunciated in this Memorandum Opinion and Order.

II.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, who was sixty-four years old on the date of his December 4, 2008 administrative hearing, is a college graduate. AR at 121, 141, 1189. His past relevant work was as a paraeducator/teacher's assistant at a continuation high school. *Id.* at 137, 178.

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[1] Plaintiff also contends that the ALJ improperly determined that he did not have a severe mental impairment. Pl. Mem. at 5. This issue is incorporated into two of the issues referenced above: whether the ALJ properly considered a treating physician's opinion and whether the ALJ properly considered the VA's disability rating.

On November 17, 2004, plaintiff filed an application for a period of disability and DIB due to derangement of the right knee and right fourth metatarsal, right shoulder impingement syndrome, pancreatitis, diabetes, and post-traumatic stress disorder ("PTSD").[2] *Id.* at 121-23, 136-37, 143. The Commissioner denied plaintiff's application initially and upon reconsideration, after which he filed a request for a hearing. *Id.* at 78-82, 86-91.

On February 15, 2007, plaintiff, represented by counsel, appeared and testified at a hearing before the ALJ. *Id.* at 1156-88. The ALJ also heard testimony from Sharon Spaventa, a vocational expert. *Id.* at 1181-87. On March 1, 2007, the ALJ denied plaintiff's claim for benefits (the "2007 Decision"). *Id.* at 53-61.

Plaintiff requested a review of the decision by the Appeals Council. *Id.* at 93. On February 15, 2008, the Appeals Council vacated the 2007 Decision and remanded the case. *Id.* at 107-09. The Appeals Council ordered the ALJ to: (1) define the term "prolonged" as used in the RFC determination and provide further rationale in support of the limitations; (2) further develop the record by obtaining the treatment notes of Dr. Larry Decker; (3) correct her finding regarding plaintiff's insured status; and (4) if warranted, secure a vocational expert to clarify the effect of plaintiff's limitations, identify appropriate jobs, and resolve any conflicts with the Dictionary of Occupational Titles. *Id.*

On December 4, 2008, plaintiff and Ms. Spaventa appeared and testified at second hearing before the ALJ. *Id.* at 1189-1210. On March 4, 2009, the ALJ, incorporating the summary of the evidence contained in the 2007 Decision, again denied plaintiff's claim for benefits (the "2009 Decision"). *Id.* at 29-33.

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[2] Plaintiff also listed "prostate" as a reason for his alleged disability, but he failed to state the actual prostate condition. *See* AR at 136-37.

Applying the well-known five-step sequential evaluation process, the ALJ found, at step one, that plaintiff did not engage in substantial gainful activity since his alleged onset date of disability, August 15, 2003. *Id.* at 33.

At step two, the ALJ found that plaintiff suffered from the following severe impairments: recurrent pancreatitis with diabetes mellitus; degenerative disc disease of the cervical, thoracic, and lumbar spine; benign cartilage endochroma of the right knee; and right shoulder impingement. *Id.*

At step three, the ALJ found that plaintiff's impairments, whether individually or in combination, did not meet or medically equal one of the listed impairments set forth in 20 C.F.R. part 404, Subpart P, Appendix 1 (the "Listings").[3] *Id.* at 56.

The ALJ then assessed plaintiff's RFC[4] and determined that he had the RFC to lift/carry fifty pounds occasionally and twenty-five pounds frequently, with the following limitations: occasionally bend, stoop, and drive motor vehicles; and precluded from prolonged standing, running, jumping, kneeling, squatting, working above shoulder level with the right upper extremity, breaking up fights between students, and performing repetitive motions of the neck/head. *Id.* at 33.

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[3] The ALJ did not make a step three finding in the 2009 Decision. Although the ALJ did not expressly incorporate her prior step three finding in the 2009 Decision, neither side raised this as an issue. Accordingly, this court will assume that the ALJ intended to incorporate the step three finding from the 2007 Decision in the 2009 Decision.

[4] Residual functional capacity is what a claimant can do despite existing exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152, 1155-56 n.5-7 (9th Cir. 1989). "Between steps three and four of the five-step evaluation, the ALJ must proceed to an intermediate step in which the ALJ assesses the claimant's residual functional capacity." *Massachi v. Astrue*, 486 F.3d 1149, 1151 n.2 (9th Cir. 2007).

The ALJ also determined that plaintiff was slightly limited in his ability to deal with work stress and to maintain attention and concentration. *Id.*

The ALJ found, at step four, that plaintiff was capable of performing his past relevant work as an "adult education teacher." *Id.* Consequently, the ALJ concluded that plaintiff did not suffer from a disability as defined by the Social Security Act. *Id.*

Plaintiff filed a timely request for review of the ALJ's decision, which was denied by the Appeals Council. *Id.* at 9-11. The ALJ's decision stands as the final decision of the Commissioner.

III.

STANDARD OF REVIEW

This court is empowered to review decisions by the Commissioner to deny benefits. 42 U.S.C. § 405(g). The findings and decision of the Social Security Administration must be upheld if they are free of legal error and supported by substantial evidence. *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001) (as amended). But if the court determines that the ALJ's findings are based on legal error or are not supported by substantial evidence in the record, the court may reject the findings and set aside the decision to deny benefits. *Aukland v. Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d 1144, 1147 (9th Cir. 2001).

"Substantial evidence is more than a mere scintilla, but less than a preponderance." *Aukland*, 257 F.3d at 1035. Substantial evidence is such "relevant evidence which a reasonable person might accept as adequate to support a conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *Mayes*, 276 F.3d at 459. To determine whether substantial evidence supports the ALJ's finding, the reviewing court must review the administrative record as a whole, "weighing both the evidence that supports and the evidence that detracts from the

ALJ's conclusion." *Mayes*, 276 F.3d at 459. The ALJ's decision "'cannot be affirmed simply by isolating a specific quantum of supporting evidence.'" *Aukland*, 257 F.3d at 1035 (quoting *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th Cir. 1998)). If the evidence can reasonably support either affirming or reversing the ALJ's decision, the reviewing court "'may not substitute its judgment for that of the ALJ.'" *Id.* (quoting *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)).

IV.

DISCUSSION

A. The ALJ Failed to Provide Specific and Legitimate Reasons for Rejecting the Opinion of a Treating Physician

Plaintiff argues that the ALJ improperly rejected the opinion of his treating psychologist, Dr. Leigh Ann Selby. Pl. Mem. at 6. Specifically, plaintiff contends that the ALJ's sole reason for rejecting Dr. Selby's opinion – that it was inconsistent with plaintiff's daily activities – was not clear and convincing. *Id.* The court agrees.

In determining whether a claimant has a medically determinable impairment, among the evidence the ALJ considers is medical evidence. 20 C.F.R. § 416.927(b). In evaluating medical opinions, the regulations distinguish among three types of physicians: (1) treating physicians; (2) examining physicians; and (3) non-examining physicians.[5] 20 C.F.R. § 416.927(c), (e); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995) (as amended). "Generally, a treating physician's opinion carries more weight than an examining physician's, and an examining physician's opinion carries more weight than a reviewing

[5] Psychologists are considered acceptable medical sources whose opinions are accorded the same weight as physicians. 20 C.F.R. § 416.913(a)(2). Accordingly, for ease of reference, the court will refer to Dr. Selby as a physician.

physician's." *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th Cir. 2001); 20 C.F.R. § 416.927(c)(1)-(2). The opinion of the treating physician is generally given the greatest weight because the treating physician is employed to cure and has a greater opportunity to understand and observe a claimant. *Smolen v. Chater*, 80 F.3d 1273, 1285 (9th Cir. 1996); *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).

Nevertheless, the ALJ is not bound by the opinion of the treating physician. *Smolen*, 80 F.3d at 1285. If a treating physician's opinion is uncontradicted, the ALJ must provide clear and convincing reasons for giving it less weight. *Lester*, 81 F.3d at 830. If the treating physician's opinion is contradicted by other opinions, the ALJ must provide specific and legitimate reasons supported by substantial evidence for rejecting it. *Id.* at 830. Likewise, the ALJ must provide specific and legitimate reasons supported by substantial evidence in rejecting the contradicted opinions of examining physicians. *Id.* at 830-31. The opinion of a non-examining physician, standing alone, cannot constitute substantial evidence. *Widmark v. Barnhart*, 454 F.3d 1063, 1067 n.2 (9th Cir. 2006); *Morgan v. Comm'r*, 169 F.3d 595, 602 (9th Cir. 1999); *see also Erickson v. Shalala*, 9 F.3d 813, 818 n.7 (9th Cir. 1993).

1. Dr. Selby

Dr. Selby, a psychologist at the VA, treated plaintiff from February 24, 2007 through at least November 5, 2008. AR at 1144. Dr. Selby diagnosed plaintiff with PTSD. *See, e.g., id.* at 973. Plaintiff attended both individual and group therapy sessions with Dr. Selby. *See, e.g., id.* at 970, 973. Dr. Selby's findings included: plaintiff was a low suicide risk; he found group therapy helpful; he struggled with thoughts and nightmares of his service during the Vietnam War; and he struggled with anger issues. *See, e.g.*, *id.* at 916, 966, 973, 993, 1000.

In a letter dated November 5, 2008, which incorporated the information required by the Mental Impairment Questionnaire, Dr. Selby diagnosed plaintiff with PTSD and a current Global Assessment of Functioning ("GAF") score of 62.[6] *Id.* at 1144-46. Dr. Selby opined that plaintiff would have a poor or fair to poor ability to: maintain attention for two hours; work in proximity to others and coordinate with them; perform at a consistent pace with reasonable rest periods; respond to criticism depending on the supervisor's attitude and tone of voice or reasonableness; get along with coworkers without distracting them; and deal with normal work stress. *Id.* at 1145. Dr. Selby based her opinion on plaintiff's descriptions of daily personal interactions and her own observations. *Id.*

2. Other Treating, Examining, and State Agency Physicians

Several other physicians offered opinions as to plaintiff's alleged mental impairment.

Dr. Larry Decker of the Vet Center treated plaintiff from October 29, 2003 through April 16, 2007. *Id.* at 841, 879. In a Mental Impairment Questionnaire dated January 26, 2007, Dr. Decker opined that plaintiff had poor or no ability to perform fourteen out of the sixteen functions listed in the Mental Abilities and Aptitude Needed to Do Unskilled Work section and all four of the functions listed in the Mental Abilities and Aptitude Needed to Do Semi-Skilled Work section. *Id.* at 834-39. Dr. Decker diagnosed plaintiff with PTSD and a GAF rating of 45.[7] *Id.* at 834.

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[6] A GAF rating of 61-70 indicates "some mild symptoms [] OR some difficulty in social, occupational, or school functioning [], but generally functioning pretty well, has some meaningful interpersonal relationships." Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 34 (4th Ed. 2000) ("DSM").

[7] A GAF score of 41-52 indicates "serious symptoms OR any serious impairment in social, occupational, or school functioning." DSM.

Dr. Jason H. Yang, a consultative psychiatrist, examined plaintiff on March 26, 2005. *Id.* at 475-79. Dr. Yang diagnosed plaintiff with depressive disorder, assigned a GAF score of 65, and did not opine any limitations. *Id.*

On April 29, 2005 and September 12, 2005, Dr. Archimedes Garcia and Dr. Glenn Ikawa, State Agency physicians, reviewed plaintiff's file and opined that he did not have a severe mental impairment. *Id.* at 490-93.

3. The ALJ's Findings

The ALJ concluded that plaintiff had no severe mental impairment. In reaching that determination, the ALJ gave no weight to Dr. Decker on the basis that his opinion was inconsistent with the medical evidence, plaintiff's "demonstrated functional capacity," and the VA's disability determination. *Id.* at 30. The ALJ also gave minimal weight to the opinion of Dr. Selby because it was inconsistent with plaintiff's daily activities.[8] *Id.* at 31. Instead, the ALJ credited the opinion of Dr. Yang. *Id.* at 59. The ALJ erred because he failed to provide specific and legitimate reasons supported by substantial evidence for rejecting Dr. Selby's opinion. *See Lester*, 81 F.3d at 830-31.

Although the ALJ gave no reason for discounting Dr. Selby's opinion apart from plaintiff's daily activities, arguably – since the ALJ stated she gave minimal weight to Dr. Selby and credited Dr. Yang – the ALJ implicitly indicated she credited Dr. Yang's opinion over that of Dr. Selby. But even if the court generously reads the ALJ's decisions to find the ALJ cited to Dr. Yang's findings as a reason for discounting Dr. Selby's opinion, it is not a legitimate reason supported by substantial evidence. On July 22, 2009, the California Department of Social Services terminated Dr. Yang's service as a consultative examiner due

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[8] Plaintiff also separately claims that the ALJ failed to discuss the VA's PTSD determination. Pl. Mem. at 5. Dr. Shelby is a VA psychiatrist and plaintiff's notes supporting this claim simply cite to Dr. Shelby's notes. *Id.* at 5-6.

to, inter alia, its discovery that he filed eleven reports which contained identical or nearly identical mental status examination findings. Reply, Exh. 1. Because the California Department of Social Services terminated Dr. Yang for performance and ethical reasons, the court finds that Dr. Yang's opinion lacks credibility, and therefore does not amount to substantial evidence.

As for the one reason the ALJ explicitly gave for discounting Dr. Selby's opinion, inconsistency between a treating physician's opinion and a claimant's daily activities may be a specific and legitimate reason for rejecting the opinion. *See Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005); *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001). The mere ability to perform activities of daily living, however, is not a specific and legitimate reason. "The Social Security Act does not require that claimants be utterly incapacitated to be eligible for benefits." *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

Here, the ALJ noted that plaintiff could make breakfast, walk, do dishes, perform school and homework, garden, shop for groceries and clothes, and go out daily. AR at 31. The ALJ further noted that plaintiff independently read, visited family and friends, attended veterans' meeting, and church. *Id.*

Plaintiff's ability to perform these daily activities of living was not a specific and legitimate reason for discounting Dr. Selby's opinion because these activities were not inconsistent with Dr. Selby's opined limitations. Dr. Selby concluded, inter alia, that plaintiff would have difficulty maintaining his attention for two hours, working with others, performing at a consistent pace, and dealing with work stress. *Id.* at 1145. None of the daily activities cited by the ALJ exceed the opined limitations.

Accordingly, the ALJ failed to cite specific and legitimate reasons supported by substantial evidence for rejecting the opinion of Dr. Selby.

B. The ALJ Failed to Properly Consider the VA's Disability Determination

Plaintiff claims that the ALJ failed to properly consider the VA's disability determination. Pl. Mem. at 7. Specifically, plaintiff argues that the ALJ misinterpreted the VA's finding. *Id.* The court agrees.

In social security disability cases, "a VA rating of disability does not necessarily compel the [Commissioner] to reach an identical result, [but] the ALJ must consider the VA's finding in reaching his decision." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (internal citation omitted); *McLeod v. Astrue*, 640 F.3d 881, 886 (9th Cir. 2011). Indeed, the "ALJ must ordinarily give great weight to a VA determination of disability" because of the "marked similarity" between the two disability programs. *McCartey*, 298 F.3d at 1076. The ALJ may give less weight to a VA disability rating but must provide "persuasive, specific, valid reasons" supported by substantial evidence for doing so. *Id.*

On June 19, 2008, the VA issued a Statement of the Case where it determined that plaintiff had a total seventy percent service connected disability rating. AR at 236-57. The VA based its disability rating on a fifty percent disability for PTSD, twenty percent disability for pancreatic insufficiency with residual scar, twenty percent disability for diabetes mellitus, and ten percent disability for mitrial valve prolapse and associated disability.[9] *Id.* at 257. The VA found that plaintiff was not entitled to individual unemployability because if only considering service connected conditions, he would be employable. *Id.* The VA, however, considered plaintiff unemployable due to non-service connected factors. *Id.*

[9] The VA disability rating is not a total of the percentages. AR at 1195.

Here, in reaching her decision, the ALJ stated that she gave great weight to the VA. *Id.* at 59. The ALJ noted that a seventy percent disability rating does not preclude work and the VA never found plaintiff unemployable. *Id.* at 31, 59-60.

The ALJ erred because she misconstrued the VA's disability determination. The VA found plaintiff employable when considering *only* his service connected conditions. *Id.* at 257. The VA expressly stated that plaintiff was unemployable due to non-service connected conditions. *Id.*

Accordingly, the ALJ failed to properly consider the VA's disability determination. The ALJ must consider the VA's determination and give it great weight, or provide specific and valid reasons why it merits less weight.

C. The ALJ Must Clarify Plaintiff's RFC

Plaintiff contends that the ALJ's RFC determination was inconsistent with her evaluation of the evidence. Pl. Mem. at 6. Specifically, plaintiff notes that the ALJ credited the opinion of Dr. Steven Nagelberg, but then reached a less restrictive RFC than Dr. Nagelberg opined. *Id*. at 6-7. The court agrees.

Dr. Nagelberg was plaintiff's treating orthopedic surgeon in 2003 and 2004. AR at 259-321. Dr. Nagelberg diagnosed plaintiff with chronic myofascial pain and right shoulder impingement syndrome. *See* AR at 289. On November 12, 2008, Dr. Nagelberg examined plaintiff and completed a Physical RFC Questionnaire. AR at 1147-53. Dr. Nagelberg opined that plaintiff, in an eight-hour day, had the RFC to: lift/carry twenty pounds occasionally and ten pounds frequently; continuously sit/stand for 45 minutes at a time with at least five minutes needed for walking after that period; stand/walk for a total of two hours; sit for at least six hours; bend and twist at the waist twenty-five percent of the time; and engage in repetitive reaching on the left side fifty percent of the time. *Id.* In addition, Dr. Nagelberg opined that plaintiff would frequently experience symptoms severe enough to interfere with attention and concentration and he was moderately limited in his ability to deal with stress. *Id*. at 1149.

At the December 4, 2008 hearing, the ALJ posed multiple hypotheticals to the vocational expert, one of which was entirely consistent with Dr. Nagelberg's opinion. *Id.* at 1204-1207. When presented with limitations entirely consistent with Dr. Nagelberg's opinion, the vocational expert opined that plaintiff would not be able to perform his past relevant work or any other work. *Id.* at 1206.

Although the ALJ credited Dr. Nagelberg's assessment (*id.* at 31), she found that plaintiff had the RFC to: lift/carry fifty pounds occasionally and twenty-five pounds frequently; and occasionally bend, stoop, and drive motor vehicles. *Id.* at 33. The ALJ precluded plaintiff from prolonged standing, running, jumping, kneeling, squatting, working above shoulder level with the right upper extremity, breaking up fights between students, and performing repetitive motions of the neck/head. *Id*. The ALJ also found that plaintiff was "slightly limited in [his] ability to deal with work stress and to maintain attention and concentration." *Id.* This RFC determination was less restrictive than the one reached by Dr. Nagelberg.

Defendant argues that the ALJ's RFC determination was a harmless typographical error and the ALJ mistakenly copied the RFC determination from the 2007 Decision. Answer at 7. Defendant maintains that the ALJ's discussion of the vocational expert's testimony responding to a hypothetical which included most of Dr. Nagelberg's functional limitations is evidence that the ALJ intended to adopt Dr. Nagelberg's RFC determination and limitations. *Id.*; *see* AR at 32.

The court agrees that the ALJ may have simply made a typographical error, but regardless of whether the RFC determination was written as intended or was a typographical error, the ALJ erred. If the RFC determination under the Findings section in the 2009 Decision was the ALJ's intended conclusion, then it was inconsistent with the opinion of Dr. Nagelberg. The ALJ must provide specific and legitimate reasons for rejecting the opinion, which she expressly credited.

If, instead, the ALJ made a typographical error and her intended RFC determination was the same as the one in the hypothetical she discussed in the 2009 Decision (*see* AR at 32), it was not harmless. Although the vocational expert found that plaintiff could perform his past relevant work as generally performed under this more restrictive RFC, which suggests harmless error, it is not harmless in this instance because there is still a conflict between Dr. Nagelberg's opinion and the functional limitations in the hypothetical discussed in the 2009 Decision. Dr. Nagelberg opined that plaintiff would be "moderately" limited in his ability to deal with stress and "frequently" experience symptoms severe enough to interfere with his attention and concentration. *Id.* at 1149. In contrast, the vocational expert opined that plaintiff could perform his past relevant work if he had a "mild" limitation in the ability deal with stress and maintain concentration and attention. *Id.* at 32, 1206. Thus, even if the intended RFC was the one discussed by the ALJ in the 2009 Decision, it still deviated from the opinion of Dr. Nagelberg. Further, this deviation was material, since the vocational expert found plaintiff could not perform any work when presented with all of Dr. Nagelberg's restrictions. *See* AR at 1206. As such, the ALJ must provide specific and legitimate reasons for rejecting Dr. Nagelberg's opinion, even if she intended to adopt the RFC suggested by defendants.

Accordingly, the ALJ erred. The ALJ needs to clarify her actual RFC determination. If the RFC determination is inconsistent with Dr. Nagelberg's opinion, the ALJ must provide specific and legitimate reasons for rejecting the limitations found by Dr. Nagelberg.

D. The ALJ Failed to Provide Clear and Convincing Reasons for Discounting Plaintiff's Subjective Complaints

Plaintiff argues that the ALJ failed to make a proper credibility determination. Pl. Mem. at 8-12. Specifically, plaintiff contends that the ALJ did

not provide clear and convincing reasons that are supported by substantial evidence for discounting plaintiff's credibility. *Id.* This court agrees in part.

An ALJ must make specific credibility findings, supported by the record. Social Security Ruling 96-7p. To determine whether testimony concerning symptoms is credible, an ALJ engages in a two-step analysis. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007). First, an ALJ must determine whether a claimant produced objective medical evidence of an underlying impairment "'which could reasonably be expected to produce the pain or other symptoms alleged.'" *Id.* at 1036 (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991) (en banc)). Second, if there is no evidence of malingering, an "ALJ can reject the claimant's testimony about the severity of her symptoms only by offering specific, clear and convincing reasons for doing so." *Smolen*, 80 F.3d at 1281; *Benton v. Barnhart*, 331 F.3d 1030, 1040 (9th Cir. 2003). An ALJ may consider several factors in weighing a claimant's credibility, including: (1) ordinary techniques of credibility evaluation such as a claimant's reputation for lying; (2) the failure to seek treatment or follow a prescribed course of treatment; and (3) a claimant's daily activities. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008); *Bunnell*, 947 F.2d at 346-47.

The ALJ did not expressly make a first step finding, but it is implied that there was objective medical evidence of an underlying impairment which could reasonably be expected to produce the symptoms alleged. *Lingenfelter*, 504 F.3d 1036. At the second step, because the ALJ did not find any evidence of malingering, the ALJ was required to provide clear and convincing reasons for discounting plaintiff's credibility.

Here, the ALJ found that plaintiff's statements regarding his symptoms and limitations were generally credible, but not to the extent alleged. AR at 59. The ALJ provided three reasons for discounting plaintiff's credibility: (1) the objective medical evidence failed to fully support his claims; (2) plaintiff received

conservative treatment and his symptoms are managed by his medication; and (3) his claims were inconsistent with his daily activities.[10] *Id.* at 31, 58-60. The ALJ's reasons were not all clear and convincing reasons supported by substantial evidence.

First, the ALJ noted that the medical evidence did not fully support plaintiff's claims. *Id.* at 58. With respect to the physical symptoms and limitations, the ALJ correctly stated that Dr. Nagelberg noted objective findings of desiccated disc and degeneration at C6-7 (*id.* at 58, 321), cervical musculature (*id.* at 58, 300), and subacromial impingement (*id.* at 58, 311), and no evidence of evidence of acute lumbar radiculopathy, lumbar plexopathy, peripheral nerve entrapment, or peripheral neuropathy (*id.* at 58, 308). The ALJ later appeared to adopt the physical limitations assessed by Dr. Nagelberg. *Id.* at 30-31. The ALJ also noted that a consultative examiner made objective findings indicating physical impairments and opined limitations. *Id.* at 59. It is unclear how these objective findings do not support plaintiff's claims, particularly when the ALJ credited Dr. Nagelberg's assessment. *Id.* at 31. As such, the ALJ's reason is not supported by substantial evidence.

With respect to the mental impairments, the objective medical evidence reflects that two treating physicians diagnosed plaintiff with PTSD and plaintiff was treated with therapy and medication. *Id.* at 652-64, 834, 1144, 1146. As discussed above, the ALJ failed to properly consider this evidence. Whether the objective medical history is sufficient to support plaintiff's alleged symptoms is

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[10] Plaintiff submitted several third party reports and letters to support his alleged functional limitations. *See* AR at 84-85, 145-52, 167-68, 198-99. The court noticed that two of the letters, from Dr. Pearl Ross and Frank Lindsey, appear to be in plaintiff's own handwriting. *Compare* AR at 84-85, 198-99 and 110-12. But it appears that the letters were signed and adopted by Dr. Ross and Mr. Lindsey. The court notes this only as a matter the parties may wish to address on remand.

unclear on this record. But because the ALJ must reconsider Dr. Selby's opinion and the VA's determination on remand, the ALJ will also need to thereafter reassess plaintiff's credibility in light of her reconsideration of the evidence of mental impairment.

Second, the ALJ found that plaintiff received conservative treatment and his symptoms were managed by medications. AR at 31, 60. *See Parra v. Astrue*, 481 F.3d 742, 751 (9th Cir. 2007) ("[E]vidence of 'conservative treatment' is sufficient to discount a claimant's testimony regarding severity of an impairment."). With respect to plaintiff's physical impairments, the ALJ's reason for discounting plaintiff's credibility is not supported by substantial evidence. Dr. Nagelberg primarily treated plaintiff with physical therapy and chiropractic care. *See, e.g.,* AR at 263, 278, 281; *see also Tommasetti*, 533 F.3d at 1040 (describing physical therapy and anti-inflammatory medication as conservative treatment). But contrary to the ALJ's findings, Dr. Nagelberg advised surgery on several occasions. *Compare id.* at 58 and 286, 301, 318. Plaintiff did not receive surgical treatment because the surgery was not authorized. *Id.* at 286; *see Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007) (stating that the failure to seek treatment may be a basis for an adverse credibility finding unless there was a good reason for not doing so).

As for plaintiff's mental impairment, the record supports the ALJ's finding that plaintiff's treatment, consisting of individual and group therapy and low-dosage medication, was conservative. AR at 652-64, 1144, 1146; *see Tommasetti*, 533 F.3d at 1040 (conservative treatment may be a clear and convincing reason for discounting a claimant's credibility).

Finally, the ALJ found that plaintiff's daily activities were inconsistent with his symptoms. AR at 60; *see Morgan*, 169 F.3d at 599 (a plaintiff's ability "to spend a substantial part of [her] day engaged in pursuits involving the performance of physical functions that are transferable to a work setting" may be

sufficient to discredit her). The ALJ noted plaintiff's ability to perform a full range of household activities and volunteer on a regular basis. AR at 60. Plaintiff testified that he could cook, wash dishes, do his laundry and take out the garbage, but that he could no longer do household repairs or any of his prior hobbies such as hiking and fishing. *Id.* at 1170-71. Plaintiff testified that he volunteered in a scholarship program, which required an hour a day, and he collected donated books from friends and brought them to the veteran center when he visited. *Id.* at 1169-70.

"[T]he mere fact a plaintiff has carried on certain daily activities, such as grocery shopping, driving a car, or limited walking for exercise, does not in any way detract from her credibility as to her overall disability." *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001). A claimant does not need to be "utterly incapacitated." *Fair*, 885 F.2d at 603. But if a claimant is "able to spend a substantial part of his day engaged in pursuits involving the performance of physical functions that are transferable to a work setting, a specific finding as to this fact may be sufficient to discredit" him. *Id.* Here, the activities plaintiff engaged in were not necessarily transferable to a work setting. *See Vertigan*, 260 F.3d at 1050. Plaintiff's ability to engage in these activities did not mean that he could maintain attention and concentrate for the entire work day, work with others, or deal with work stress. As such, plaintiff's ability to perform these activities does not support the ALJ's finding that plaintiff lacked credibility.

In short, although the ALJ provided some clear and convincing reasons supported by substantial evidence for discounting plaintiff's credibility, most of the reasons she gave were not supported by substantial evidence.

V.

REMAND IS APPROPRIATE

The decision whether to remand for further proceedings or reverse and award benefits is within the discretion of the district court. *McAllister v. Sullivan*,

888 F.2d 599, 603 (9th Cir. 1989). Where no useful purpose would be served by further proceedings, or where the record has been fully developed, it is appropriate to exercise this discretion to direct an immediate award of benefits. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000) (decision whether to remand for further proceedings turns upon their likely utility). But where there are outstanding issues that must be resolved before a determination can be made, and it is not clear from the record that the ALJ would be required to find a plaintiff disabled if all the evidence were properly evaluated, remand is appropriate. *See Benecke*, 379 F.3d at 595-96; *Harman*, 211 F.3d at 1179-80.

Here, as set out above, remand is required because the ALJ erred in failing to properly evaluate Dr. Selby's opinion, the disability determination of the VA, and plaintiff's credibility. The ALJ also failed to provide an RFC determination consistent with her analysis. On remand, the ALJ shall: (1) reconsider the opinion provided by Dr. Selby regarding plaintiff's mental impairments and limitations, and either credit her opinion or provide specific and legitimate reasons supported by substantial evidence for rejecting it; (2) reconsider the VA's disability determination, and either credit it or provide persuasive, specific, and valid reasons for rejecting it; (3) clarify her RFC determination; and (4) reconsider plaintiff's subjective complaints with respect to his mental impairments and the resulting limitations, and either credit plaintiff's testimony or provide clear and convincing reasons supported by substantial evidence for rejecting them. The ALJ shall then proceed through steps four and five to determine what work, if any, plaintiff is capable of performing.

VI.

CONCLUSION

IT IS THEREFORE ORDERED that Judgment shall be entered REVERSING the decision of the Commissioner denying benefits, and REMANDING the matter to the Commissioner for further administrative action consistent with this decision.

DATED: September 7, 2012

SHERI PYM
United States Magistrate Judge